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Supreme Court, U.S.
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No. __-____

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IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

—v.—

THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondent.

ON PETITION FOR WRIT OF CERITORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the qualified immunity provisions of the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101, *et seq.*, bar damages claims for breach of a state court-approved voluntary settlement agreement, eliminate the obligation to act in good faith and deal fairly implicit in the settlement agreement, and can without jury trial conclusively disguise transparent racial and ethnic bigotry.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of this petition.

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OPINIONS BELOW

The opinion below, of the Eleventh Circuit Court of Appeals, is unreported. It is reproduced in the appendix at App. 1a. Rehearing was denied, in an unpublished order. App. 3a. The district court's order dismissing Count V of plaintiff's complaint is unreported. The district court's orders granting immunity from damages under the Health Care Quality Improvement Act are unreported and are reproduced in the appendix at App. 5a.

STATEMENT OF JURISDICTION

Judgment was entered by the Eleventh Circuit Court of Appeals on January 18, 2000. App. 1a. Rehearing and rehearing en banc were denied on March 21, 2000. App. 3a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 42 U.S.C. § 11101, *et seq.*

STATEMENT OF THE CASE

Mahfouz El Shahawy, M.D. (Shahawy), sued the Sarasota County Public Hospital Board (the Board), and others in the Circuit Court of Sarasota County, Florida, seeking certiorari review of the Board's wrongful denial of Shahawy's hospital staff privileges at Sarasota Memorial Hospital, and damages, injunctive and declaratory relief for a previous denial of Shahawy's staff privileges. Both suits alleged a perceived history of bias and discriminatory animus as a basis for the Board's denials.

The state court litigation was resolved at a court-ordered mediation where the parties voluntarily entered into a settlement agreement which embodied procedures designed to provide an unbiased and fair consideration of Shahawy's application for staff privileges by the Board. Simple logic compels the conclusion that entry upon such voluntary settlements perforce waived any immunity the Board may have had.

The settlement agreement provided that two separate panels would individually consider Shahawy's application and make separate recommendations, to be clothed with a presumption of correctness, to the Board. The state circuit court approved the settlement agreement, which materially devi-

ated from the Board's standard bylaw review procedures for privileges applications. As consideration, Shahawy dismissed with prejudice all pending litigation. After separate deliberations, both panels voted in favor of granting Shahawy privileges. The Board nonetheless purported to deny Shahawy's application based on alleged claims of "disruptive behavior" at the hearing where the Board was obliged to accord presumption of correctness.

Shahawy sued the Board and others in the United States District Court for the Middle District of Florida alleging federal civil rights claims and a state breach of settlement agreement claim, seeking damages, declaratory and injunctive relief. Shahawy contended the Board's breach of the settlement agreement was a result of bias and discriminatory animus, and that the Board's stated reasons for denial of his staff privileges were pretextual.

The district court nevertheless granted the Board immunity from the breach of settlement agreement claims based on the qualified immunity provisions of the *HCQIA*, directed a verdict on the civil rights claims following seven days of testimony before the jury, and ultimately dismissed the injunctive relief claims for breach of settlement agreement, post-trial. Despite the substantial if not overwhelming evidence that the Board blatantly disregarded its own obligation to accord the panels' findings presumptive correctness, the district court found that the Board was entitled to a presumption of correctness under the provisions of the *HCQIA*, that the Board provided Shahawy with a fair review of his privileges application, and concluded that the Board was therefore entitled to immunity from damages. No more transparent effort to bury justiciable disputes of fact in legal logorrhea may be found in recent decisions.

On appeal, the Eleventh Circuit affirmed. The court found that Shahawy had not "pointed to anything in the settlement expressly or by necessary implication waiving HCQIA

immunity from damages." As to Dr. Shahawy's remaining issues on appeal, the court stated, "[W]e reject all of Dr. Shahawy's arguments in support of his issues on appeal essentially for the reasons given by the district court in its orders of December 31, 1996, January 15, 1997 and July 16, 1998."

REASONS FOR GRANTING THE WRIT

The decision below presents the important but unanswered question whether the immunity provisions of the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101, *et seq.*, bar damages claims for breach of a state court-approved voluntary settlement agreement, eliminate the obligation to act in good faith and deal fairly implicit in the settlement agreement, and provide conclusive disguise for bigotry without according jury trial.

Although this Court has yet to decide a case expressly involving application of the *HCQIA*, this Court has recognized Congress' expressed intent that the *HCQIA* immunity provisions were not designed "to protect illegitimate actions taken under the guise of furthering the quality of health care." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332, n.12 (1991). This Court has further noted the limited nature of the *HCQIA's* immunity provisions which "insulated certain medical peer-review activities from antitrust liability . . . ." *Patrick v. Burget*, 486 U.S. 94, 106, n.8 (1988). The *HCQIA* "essentially immunizes peer-review action from liability if the action was taken 'in the reasonable belief that [it] was in the furtherance of quality health care.' " *Burget*, 486 U.S. at 106, n.8 (quoting 42 U.S.C. 11112(a)).

The presumptions created under the *HCQIA* presuppose that the governing body has enacted established review procedures in conformity with standards enunciated under the *HCQIA* that must be followed in order for a health care

entity to seek immunity. Only because the *HCQIA* presupposes that a reviewer's actions were taken in the reasonable belief that the actions were in furtherance of quality health care, the *HCQIA* makes bad faith and improper motives on the part of a reviewing body irrelevant. *Bryan v. Holmes*, 33 F.3d 1318, 1333 (11th Cir. 1994).

The HCQIA's delineated review provisions and afforded presumptions starkly contrast with the specific review procedures enunciated in the parties' voluntary court-approved settlement agreement in the instant case. Although the Board does have established bylaw procedures for the review of applications for privileges, the procedures set forth in the settlement agreement materially departed from the Hospital's bylaws, and were not consistent with *HCQIA* review standards.

The purpose of the settlement agreement was to end all litigation and finally to provide a fair and unbiased mechanism to decide Shahawy's privileges application, by creating a presumption of correctness to attach to the decisions of the judicial panels. The Board's agreed sole responsibility under the settlement agreement was to act in an appellate capacity in seeing that the panels' findings were not clearly erroneous. The settlement agreement limited the evidence that the Board could review to only the panels' findings, and did not authorize the Board to conduct an independent examination into the competence or professional conduct of Dr. Shahawy—that was the responsibility of the panels. That the presumptions created and procedures to be utilized under the settlement agreement materially deviated from the hospital's own bylaws, was a fact recognized and expressly assented to by the Board.

Additionally, within the context of carrying out the terms of the settlement agreement were the parties concomitant obligations to act in good faith and deal fairly. Under Florida law, the implied covenant of good faith and fair dealing is a

part of every contract. *County of Brevard v. Miorelli Engineering, Inc.*, 703 So.2d 1049, 1050 (Fla. 1997) ("[E]very contract includes an implied covenant that the parties will perform in good faith."); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999) (A party's good faith cooperation is an implied condition precedent to performance of a contract; where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing himself of his own wrong doing."). In this case, not only was there an implied obligation to act in good faith and deal fairly in carrying out the terms of settlement agreement, but the parties expressly agreed to specific good faith measures designed to ensure a fair and impartial review, and to eliminate bad faith or improper motives.

In first granting the Board immunity from damages, the district court applied the review standards set forth in the *HCQIA* to the Board's actions, without analyzing whether the settlement agreement even contemplated application of the *HCQIA*. Where the Board was found by the district court to have deviated from procedures agreed to under the settlement agreement, the district court simply held that such deviations were irrelevant, interpreting the immunity provisions of the HCQIA to be concerned only with whether certain procedures were made available, and not whether the procedures were in fact followed. Then, in deciding that the Board did not breach the settlement agreement for purposes of awarding injunctive relief, the district court expanded the terms of the settlement agreement to include Hospital bylaw provisions, that but for their incorporation, would have required the conclusion that the Board in fact breached the settlement agreement. The district court discarded Shahawy's claims of waiver on the basis that the Board was without such authority to waive statutory immunity.

The decision below frustrates the purpose of the settlement agreement to avoid Board bias and demonstrated unfairness by providing a presumption of correctness (as applied by the

district court under the provisions of the *HCQIA)* to the Board's decision. The afforded Board presumption, in derogation of the panels' findings, obliterated the purpose of the settlement agreement to remove the Board's power to manipulate the review process. Moreover, because the *HCQIA* purports to makes bad faith or improper motives on the part of a reviewer irrelevant, the decision below enabled the Board to avoid its basic obligation of good faith and fair dealing required under the state court-approved settlement agreement.

The Board freely entered upon the settlement agreement with full knowledge that the procedures contained therein were wholly outside of its governing bylaws, and with the complete understanding that it would be bound by the panels' decisions absent clear error. Such agreements are "highly favored and will be enforced wherever possible. *Robbie v. City of Miami*, 469 So. 2d. 1384, 1385 (Fla. 1985). The fact that the settlement agreement may have effectively eliminated the Board's alleged entitlement to HCQIA immunity is of no consequence. *See Abrahamson v. The Florida Psychological Assoc., et al.*, 634 So. 2d. 610, 612 (Fla. 1994). Indeed, the settlement agreement provided that the Board pay Shahawy money damages, a provision that would otherwise be repugnant to notions of immunity from damages under the *HCQIA*.

The Board's documented illegitimate actions so fundamentally deviated from the standards enunciated in the HCQIA, "that no reasonable medical practitioner or hospital could believe to be part of legitimate peer review." *Boczar, M.D. v. Manatee Hospitals & Health Systems, Inc.*, 993 F.2d 1514, 1518 (11th Cir. 1993). The evidence showed extreme disparate treatment Shahawy received as compared to other physicians, and clear Board bias and discriminatory animus. Shahawy's claims of discriminatory animus and pretext were based on record evidence that Board Members referred to Shahawy as "a foreigner and a nigger and camel

driver;" an "A-rab" or "Arab;" a "wop" or a "wog;" "he even married a white woman;" "consider where he is from and where he was from was well known to be Egypt;" and that the chairman of the Board had spoken of Shahawy in terms that "it was about darkies or Africans and being on the doorstep," implying that Dr. Shahawy "was foreign and different and bad."

In this regard the record was crystal clear in only one aspect: Dr. Shahawy's medical record. A brilliant *summa cum laude* graduate of the University of Vienna Medical School, a fellow of the Mayo clinic, Boarded in Internal Medicine and Cardiology, and member of every important medical society, Dr. Shahawy had never even been accused of malpractice. His medical record is impeccable and unblemished and his putative "disruptiveness" was not even alleged to have occurred in a medical, as opposed to, a legal, context. No medical reason for rejection exists.

The district court rejected Shahawy's evidence of bias, prejudice, and pretext on the theory that the "reasonable belief" and "reasonable effort" requirements of the HCQIA are subject to an objective standard, and assertions and compelling proof of bad faith are therefore irrelevant. However, the district court's determination in this regard underscores the inapplicability of the HCQIA to the settlement agreement, principally because the central purpose of settlement agreement was to *eliminate* bad faith and improper motives of the Board. Essentially, the decision below immunizes the Board from its obligation to deal fairly and act in good faith in complying with the settlement agreement, conduct for which the Board would otherwise be estopped from availing itself of liability. It allows a bigoted, political group of non-physician, elected officials to practice racial and ethnic discrimination with impunity under the cloak of medical peer review.

The Board's illegitimate and pretextual actions, and material breaches of the settlement agreement, taken under the *guise* of furthering quality health care, are exactly the type of conduct that Congress and this Court have said the HCQIA was not designed to protect. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332, n.12 (1991).

CONCLUSION

For the foregoing reasons, certiorari review should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3089
Filed January 18, 2000
D.C. Docket No. 95-269-CIV-T-21-B

MAHFOUZ EL SHAHAWY,

Plaintiff-Appellant,

versus

THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before:

TJOFLAT, CARNES, and GARWOOD*,

Circuit Judges.

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* Honorable William L. Garwood, Senior Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

PER CURIAM:

Plaintiff-appellant Mahfouz El Shahawy (Dr. Shahawy) appeals the district court's dismissal of his complaint, challenging on appeal only the dismissal of count V of the complaint against defendant-appellee The Sarasota County Public Hospital Board (the Hospital Board) for damages, and injunctive and declaratory relief. Dr. Shahawy urges two issues on appeal, namely that the district court erred in concluding as a matter of law that the Hospital Board was immune from damages under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152, for its alleged breach of its prior settlement agreement with him and that thereafter, in the findings of fact and conclusions of law on Dr. Shahawy's claims for equitable relief, the district court erred in determining that the Hospital Board did not breach the settlement agreement. After considering the arguments of counsel, the briefs and the relevant portions of the record, we conclude that Dr. Shahawy has demonstrated no reversible error. As the district court observed, he has not pointed to anything in the settlement expressly or by necessary implication waiving HCQIA immunity from damages. None of the relevant fact findings in the district court's July 16, 1998 order is clearly erroneous. We reject all of Dr. Shahawy's arguments in support of his issues on appeal essentially for the reasons given by the district court in its orders of December 31, 1996, January 15, 1997 and July 16, 1998.

Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3089
March 21, 2000

MAHFOUZ EL SHAHAWY,

Plaintiff-Appellant,

versus

THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d.___).

Before:

TJOFLAT, CARNES, and GARWOOD*,

Circuit Judges.

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* Honorable William L. Garwood, Senior Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

GERALD TJOFLAT

GERALD TJOFLAT
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 95-269-CIV-T-21-B

MAHFOUZ EL SHAHAWY,

Plaintiff,

—v.—

MARILYNN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, AND THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants.

ORDER

This cause comes before the Court on Plaintiff's Post-Trial Brief (Dkt. 256), Defendants' Post-Trial Brief (Dkt. 259), and Plaintiff's Post-Trial Reply Brief (Dkt, 260). This Order shall serve as the Court's Findings of Fact and Conclusions of Law made pursuant to Rule 52, Federal Rules of Civil Procedure.

I. General & Procedural Background

In his Amended Complaint (Dkt. 40), Plaintiff asserts multiple federal civil rights claims and a state law breach of contract claim against the Sarasota County Public Hospital Board ("Board") and several of the Board members individually, based on conduct related to the consideration

of his application for privileges to practice at Sarasota County Public Hospital ("SCPH"). Following the granting in part of Defendants' motions to dismiss the original Complaint, an interlocutory appeal by the Defendants that resulted in partial reversal of the Order denying those motions in part, the filing of the Amended Complaint; clarification of this Court's Order on the motions to dismiss; and a limited grant of summary judgment in favor of Defendants, this case proceeded to trial on the following claims against the following Defendants: Count I against the individual Defendants for violations of 42 U.S.C. §§ 1981, 1985(2) & (3); Count III against the Board for retaliation against the Plaintiff as a result of exercise of his First Amendment rights; Count IV against the Board for violation of 42 U.S.C. § 2000d-a, and Count V against the Board for breach of contract.[1] The general demand of Plaintiff's Amended Complaint (Dkt. 40) sought both legal and equitable relief as to all claims.

At trial, following the close of Plaintiff's case-in-chief, the Court granted the Defendants' motions for judgment as a matter of law as to Counts I, III, and IV. Additionally, the Court had already determined prior to trial that the Board was immune from liability for damages as to Count V,[2] with the dismissal of Counts I, III, & IV, and, after hearing from the parties, the Court discharged the jury. The trial proceeded thereafter to the Court on Count V only. Following the close of evidence, the Court granted Counsels' request to file post-trial written submissions, in lieu of final arguments, as to Count V. Those submissions are now before the Court.

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[1] The Court's December 13, 1996, Order (Dkt. 157) sets forth both the foregoing procedural history and the nature of Plaintiff's other claims in greater detail.

[2] *See* Order (Dkt. 204) of December 31, 1996.

II. Findings of Fact and Conclusions of Law

Pursuant to Rule 52, Federal Rules of Civil Procedure, the Court now makes the following findings of fact and conclusions of law.

A. Background

Plaintiff Mahfouz El Shahawy, M.D., ("Plaintiff" or "Shahawy") is a cardiologist. In the 1980's he unsuccessfully brought suit in this Court on various claims. In 1991—following that prior unrelated suit, which alleged various civil rights, antitrust, and state common law claims, based on the denial and termination of certain medical privileges at Sarasota County Public Hospital ("SCPII" or "Hospital")[3]—Plaintiff again submitted an application for staff membership at SCPH. His application was considered in accordance with the then-applicable Hospital Bylaws. Specifically, in May 1991, Plaintiff's application was considered and recommended for approval by the Medical Section Privileges Committee of the Hospital,[4] which forwarded his application on to the Medical Staff Credentials Committee. Following an interview of Plaintiff by the Credentials Committee, at which Plaintiff, according to the minutes and records of the Committee,[5] became "very argumentative" with its members, a majority of that Committee voted to override the favorable recommendation of the Section Privileges Committee and submit an

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[3] *See Shahawy v. Harrison*, 875 F.2d 1529, 1531 (11th Cir. 1995) (recounting much of the history of Plaintiff's prior, unrelated federal court suit.)

[4] Such recommendation, however, as reflected in the Privileges Committee's meeting minutes, was not without significant reservations and conditions. *See* Def. SCPHB Ex. 30 (requiring, inter alia, that Plaintiff be monitored for disruptive behavior, including "harassment or threatening of physicians").

[5] *See* Def. SCPHB Exs. 31 & 32.

unfavorable recommendation to the Medical Staff Executive Committee based upon the opinion that Plaintiff was "disruptive." Thereafter, the Staff Executive Committee voted to accept the Staff Credentials Committee's unfavorable recommendation, and thus presented to the Board the recommendation that Plaintiff be denied privileges to practice at the hospital. The Board then appointed a Judicial Review Committee ("JRC") to review the matter, as provided for in the Hospital Bylaws. Ultimately, in January 1994 the Board voted to deny Plaintiff's application for privileges.

In the interim between the submission of his application in 1991 and the Board's January 1994 decision—sometime in 1992—Plaintiff filed suit in the Circuit Court in and for Sarasota County ("Circuit Court") seeking damages against various of the then-current Board members of the Hospital. Following the Board's January 1994 decision, Plaintiff filed a second suit in the Circuit Court. This suit, against the SCPH Board only, sought a writ of certiorari to review its denial of Plaintiff's privileges application. These two Circuit Court suits were ultimately joined and both were referred to mediation. The mediation resulted in two "Memorand[a] of Settlement"—actually transcripts of portions of the mediation conferences—wherein the parties set forth the tentative agreement(s) reached. The Board later approved the settlement of these suits, and these "memoranda" were reduced to two documents, each entitled Summary of Settlement Agreement (hereinafter, "Settlement Agreement"), which, along with various other documents, were later executed by the parties in resolution of both Circuit Court suits.

The specifics of the Settlement Agreement were as follows: contemporaneous with dismissal of his first Circuit Court suit, Plaintiff would receive $500,000. Thereafter, the parties would reconvene the privileges application process—roughly midway through—at the stage at which the

Medical Staff Executive Committee's ("MSEC") recommendation on Plaintiff's application was submitted to the Board and reviewed by a JRC before being finally considered by the Board. Upon commencement of these proceedings, Plaintiff would dismiss the Circuit Court case against the Board.

For the reconsideration of Plaintiff's application, the Settlement Agreements provided for a modification of a portion of the normal procedures. Instead of the MSEC's recommendation being considered by just one body (i.e., the IRC) as was normal under the By-laws, it would be considered simultaneously by two. One body would be the previously appointed JRC Panel, or Bylaws JRC, reconstituted for this purpose, the other would be a "Staff Panel," or Staff JRC, constituted according to the terms of the parties' agreement.[6] Pursuant to the Settlement Agreements, the JRC Panels would convene in a joint hearing presided over by a neutral hearing officer, at which time each Panel would reach separate, sealed recommendations on Plaintiff's privileges application.

As noted above, under Article VII of the By-laws—the procedure under which Plaintiff's 1991 privileges application was first considered—following the negative recommendation of the MSEC, an applicant could request that a JRC be convened to review the recommendation of the MSEC. According to § Article VIII, § 3(i) of the Bylaws, review by a JRC is pursuant to an "erroneous" standard. The conclusion of the JRC is then forwarded to the Board for action. The By-laws do not expressly state a standard by which the Board is to review the JRC finding, simply stating, "[The Board] may affirm, modify, or reverse the deci-

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[6] The parties have used multiple sets of terms to refer to these two panels. The Court has also varied somewhat in the names it has used. However, in this Order the Court will use the terms "Bylaws JRC" and "Staff JRC", as set forth in the text above, and will refer to the panels collectively as the "JRC Panels."

sion of the Judicial Review Committee, or it may refer the matter back to the [JRC] for further review and recommendation."[7]

However, as noted, the Settlement Agreements set forth a partially modified procedure. Thereunder, if the recommendation of the Bylaws JRC was favorable to Plaintiff, it was to be presented to the Board for decision pursuant to Article VIII, Section 4 of the By-Laws. But if the recommendation of the Bylaws JRC was unfavorable to Plaintiff, it would be disregarded and the recommendation of the Staff JRC would he forwarded to the Hospital Board with a presumption of correctness.

Ultimately, three evenings of hearings[8] were held before the JRC Panels to determine the issue of "[W]hether [Plaintiff] is so disruptive that his prospective disruption will have an adverse effect on patient care."[9] The hearings were adversary in nature, with the Medical Staff arguing against the granting of privileges to Plaintiff, and Plaintiff, of course, arguing for the granting of privileges. As stated by the neutral hearing officer who presided over the hearings, the Medical Staff carried the burden of proving by the greater weight of the evidence (i.e., the preponderance) that the prospective disruption caused by Plaintiff would have an adverse effect on patient care.[10] Additionally, these hearings had many other procedural safeguards, to wit, all parties were represented by counsel, were permitted to make opening statements, and were permitted to call and examine witnesses and to cross-examine those witnesses

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[7] Art. VIII, § 4(e) at p. 20, of Bylaws of the Medical Staff of Sarasota Memorial Hospital, as amended February 1989. Def. SCPHB Ex. 1.

[8] Transcripts of these hearings are in the record as Plaintiff's Exhibits 150, 152 & 153.

[9] Plaintiff's Ex. 150, at p. 11, ln. 19 to p. 12, ln. 1.

[10] Plaintiff's Ex. 150, at p. 11, ln. 19 to p. 12, ln. 1.

called by other parties. As noted above, a neutral individual presided over the proceedings, made evidentiary rulings, and "charged" the two Panels, explaining to them much of that explained above (i.e., the issue to be resolved, on whom the burden to prove that issue rested, etc.).

At these hearings, nine witnesses were called to testify on the subject of Plaintiff's behavior. These witnesses were specifically asked about Plaintiff, their knowledge of his prior conduct, and their experience(s) working with him. Each witness was also asked to render an opinion about whether Plaintiff would be a disruptive influence on the rendering of patient care if granted privileges at SCPH. These witnesses roughly split; the five called by the Medical Staff testified against the grant of privileges; the four called by Plaintiff (including himself) testified for the grant of privileges. However, at the hearings the Medical Staff also introduced various other evidence, including: the files of the various lower committees that had considered Plaintiff's 1991 privileges application; affidavits from various other physicians who opposed the granting of privileges to Plaintiff; and a videotape showing Plaintiff's demeanor and conduct at various meetings of the Hospital Board.

Following the hearings, the Bylaws and Staff JRC Panels each retired separately to deliberate. The sole question that each Panel was given to answer was as follows, "Should [Plaintiff] be granted medical staff privileges?"[11] The Bylaws JRC voted 4-1 in favor of granting privileges. The Staff JRC voted 4-0 in favor of granting privileges. *Id.*

As the finding of the Bylaws JRC was favorable to Plaintiff, pursuant to the paragraph 2(e) of the Settlement Agreement, that finding should have been presented to the Board for decision pursuant to Article VIII, Section 4 of

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[11] *See* Plaintiff's Exhibit 2.

the By-Laws. However, such was not done, apparently because, contrary to the parties intention, the verdict of the Staff JRC was revealed to Hearing Officer Goodheart—who in turn revealed it to the parties and their counsel—before the verdict of the Bylaws JRC was returned. This occurrence apparently prompted a meeting, held on September 7, 1994, at which counsel for the parties agreed that Hearing Officer Goodheart, who had presided over the Panel hearings, would present both decisions (i.e., that of the Bylaws and Staff JRC Panels) to the Board and read to the Board an instruction which stated, in pertinent part.

> "I am here to present the findings of the two committees which met to hear evidence for and against [Plaintiff] being granted staff privileges . . . . These decisions come to you with a presumption of correctness."

As reflected in the minutes of the Hospital Board,[12] on September 12, 1994, the Hearing Officer did appear and read the foregoing instruction (in its entirety) to the Board, after which the Board adopted a resolution which stated that the Board intended:

> to reaffirm [its] position as stated in the August 8, 1994, Board meeting, which indicates that the Board will abide "unequivocally" by the Medical Staff Bylaws in the handling of the JRC recommendation and in accordance with the Summary of Approved Settlement Agreement (in case # 94-709-CA-01), dated July 12, 1994, paragraph 2(e), and to support the statement made before this group today by Harry S. Goodheart, Esq.

Thereafter, on September 22, 1994, the Medical Executive Committee held a meeting to review the recommen-

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[12] Plaintiff's Ex. 142.

dation of the Bylaws JRC. The minutes of that meeting[13] reflect that the MEC resolved (1) to recommend denial of Plaintiff's application at the Board meeting scheduled for October 25, 1994, at which Plaintiff's privileges application would be considered and (2) that Dr. Fogleman, then Chief of Staff, would appear at that Board meeting and present a memorandum restating the MEC's opposition to Plaintiff's privileges application.

On October 25, 1994, the Board held the meeting to hear Plaintiff's privileges application. At this meeting, the Board received submissions and otherwise heard from the Medical Staff and also from Plaintiff through his attorney, Walter Campbell. Dr. Fogleman, representing the MEC/ Medical Staff presented the above-mentioned memorandum (restating the opposition of the MEC) and also spoke briefly, summarizing that position. Plaintiff's attorney was allowed to submit a memorandum[14] and also to speak at length on several topics addressed therein; among these were the ultimate issue of whether Plaintiff should be granted privileges, as well as several procedural issues arising from the settlement agreement, including Plaintiff's position that the settlement agreements had been modified by the September 7, 1994, meeting of counsel such that the Board would now receive the findings of both Panels and was to afford both a presumption of correctness. These submissions and oral presentations prompted some questions from the Board, including a question from one Board member regarding the number and identity of physicians on the MEC who had recommended that Plaintiff's application be denied. Shortly thereafter, Plaintiff himself began addressing the Board and the Chairwoman, Defendant Lee, directly. Plaintiff spoke briefly, making general references to his due process rights, before

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13 Def. SCPHB Ex. 145.

14 Pl. Ex. 86.

his attorney asked for a brief period to take Plaintiff outside of the hearing room to speak with him, where the two remained for several minutes. When Plaintiff and his attorney reentered the hearing room, Plaintiff again addressed the Board and Chairwoman Lee directly. By this time, Chairwoman Lee had already announced several times that the meeting was closed and that the Board was going into executive session. For the last few minutes of the hearing, Plaintiff and Chairwoman Lee spoke back and forth directly, with Plaintiff making continued references to his due process rights, stating that he would have whoever denied him his due process held responsible, demanding that the Board not commence its executive session without a representative from the Department of Health Care Administration present, and stating his opinion that Lee had "disrupted the Medical Staff and . . . [the] good will of th[e] community." During this exchange, Chairwoman Lee again announced that the meeting had been closed, that the Board was going into executive session, and that Plaintiff was being disruptive. After this exchange, the meeting concluded.

On October 31, 1994, as reflected in its minutes,[15] the Board met, reviewed the evidence, and passed by a vote of 6-2 a resolution to deny Plaintiff's privileges application. Inter alia, the resolution included the finding that Plaintiff had acted in a disruptive fashion during the October 25, 1994, hearing, engaging in "uncontrollable tirades and threatening statements." The resolution continued, "it is obvious, unfortunately, that Dr. Shahawy has not reformed as previously stated and if such conduct occurred during a vital performance of his duties as a physician, the prospective disruption would have an adverse effect on patient care." This resolution became effective through the Board's

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[15] Pl. Ex. 108.

Final Decision of November 8, 1994,[16] denying Plaintiff's application, Therein, the Board stated:

> After due deliberation and based upon all relevant information in the record, after hearing various arguments and comments by the Board members, upon considering the recommendations of the Judicial Review Committees, upon being fully advised by Counsel, and until no further discussion was offered, the Board reached it's [sic] final decision. The Board, understanding the potential impact of prospective disharmony and disruptive behavior on the part of Dr. Shahawy, feels such behavior may hinder the rendering of quality patient care at Sarasota Memorial Hospital. The Board renders this final decision, based on what it feels to be clear and compelling evidence on the record which clearly demonstrates that Dr. Shahawy was unable or unwilling to conform his behavior to a non-disruptive type of conduct. Therefore, the Sarasota County Public Hospital Board has voted to deny [Dr. Shahawy's] application for Medical Staff privileges at Sarasota Memorial Hospital . . . .[17]

This lawsuit followed thereafter.

B. Count V: Breach of Contract Claim

As noted above, the remaining issue in this case is whether the Defendant SCPHB breached its contract with Plaintiff, as embodied in the Settlement Agreements, and, if so, what is the proper equitable remedy. Since, as explained below, the Court concludes that the agreement was not breached, the Court need not reach the issue of the proper remedy.

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16 Def. SCPHB Ex. 162.

17 *Id.*

In Count V of his Amended Complaint (Dkt. 40), Plaintiff alleges that the settlement agreement he had with the Hospital Board constituted a contract, pursuant to which he was entitled to favorable action on his application for staff privileges based on the findings of fact of the review committees, unless it was determined, "based on substantial competent evidence," that those findings of fact were erroneous. Continuing, Plaintiff's Amended Complaint asserts that the Board breached that contract by disregarding the findings of fact made by the review committees and denying Plaintiff's privileges application without a determination that the findings of fact made by those committees were clearly erroneous—a determination for which Plaintiff alleges there was no record basis.

In other words, the core of Plaintiff's claim of breach of contract rests upon the assumption that the Board was obliged to apply a presumption of correctness to the decisions made by both JRC Panels but failed to do so. This attack two-fold: Plaintiff both challenges the Board's ability, under the Settlement Agreements, to "receive evidence" at the October 25, 1994, hearing and, assuming such evidence was properly received, lie challenges whether there was sufficient evidence to overcome the presumption of correctness.

Additionally, in his Post-Trial Brief (Dkt. 256) Plaintiff argues that the contract was breached in several other ways not specifically alleged in his Amended Complaint, to wit: the Board's allowing Dr. Fogleman to appear and be heard (through presentation of the memo from the MEC) at the October 25, 1994 meeting; the Board's consideration of Plaintiff's conduct at the October 25, 1994, meeting as part of its decision to deny his privileges application;[18] the

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[18] These two arguments are really just two sub-components of one larger argument posited by Plaintiff: that the Board breached the Settlement Agreement by receiving "new evidence" at the October 25, 1994, meeting.

Board's asserted failure to provide the Board with both JRC Panels' findings; and Board Member (and Defendant) Moss' alleged consideration of the minutes of the September 22, 1994, meeting as part of his decision on Plaintiff's privileges application.

1. The Presumption(s) of Correctness and Modification of Paragraph 2(e) of the Settlement Agreement

Plaintiff contends that the September 7, 1994, meeting of Counsel effected a modification of the Settlement Agreements, binding on all parties, such that both JRC Panels' findings were to be delivered to the Board with a presumption of correctness. The Defendant Hospital Board disputes that the September 7th meeting modified the procedures for consideration of Plaintiff's application set forth in paragraph 2(e) of the Settlement Agreement: that is, since the finding of the Bylaws JRC was in fact favorable to Plaintiff, that finding should have been presented to the Board for decision pursuant to Article VIII, Section 4 of the By-Laws with no presumption regarding its correctness. But, even assuming that both the decisions of both JRC Panels were afforded a presumption of correctness, Defendant argues that the evidence was sufficient for the Board to properly overturn those decisions. The parties have devoted a substantial portion of their briefs to this issue of modification, at least in part, at the direction of the Court. However, upon examining the pleadings, evidence, and the post-trial submissions, the Court concludes that it is unnecessary to address this issue because there is sufficient evidence to support the Board's decision under the standard argued by Plaintiff. That is, for purposes of these findings, the Court has assumed—but not decided— that the Board was obliged to receive the findings of both JRC Panels with a presumption of the correctness of both.

2. The Board's "Receipt" of Evidence at the October 25, 1994 Hearing

a. Issues and Arguments

Plaintiff's argument that the Board improperly received "evidence" at the October 25, 1994, meeting hinges in large part on his argument that the procedures by which his application was to be considered were "completely outside the Bylaws." The Court disagrees. It is clear that the procedures by which Plaintiff's application was considered were indeed specialized and different in some key aspects from those by which an application would normally be considered; however, at most, those procedures were a modification of one portion of one step in the normal procedures.[19] The most convincing evidence of the conclusion

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[19] The procedures set forth in the Settlement Agreements, although at times termed by the Court and parties to be a de novo consideration, did not actually start over from the beginning. Rather, the procedures picked up at a certain point—roughly mid-way through—in the prior consideration of Plaintiff's application. Specifically, the agreed-to procedures began following the Medical Staff Executive Committee's negative recommendation of Plaintiff's application to the Board and proceeded from there in a modified form. To explain further, Plaintiff's application had previously been considered and recommended for approval by the Medical Section Privileges Committee, and then forwarded to the Medical Staff Credentials Committee, which submitted an unfavorable recommendation to the Medical Staff Executive Committee. The MSEC thereafter recommended to the Board that Plaintiff's application be denied. The Board then appointed a Judicial Review Committee to review the matter and ultimately voted to deny Plaintiff's application. Thereafter Plaintiff filed suit against the Board and later settled that suit by agreeing to the modified procedures under which the prior JRC and Board decisions would be vacated, and the matter would proceed to new round of JRC hearings—before two panels—before going to the Board again for final consideration. Thus, just as with a normal privileges application, the modified procedures set forth in the Settlement Agreements provided that, following the MSEC decision. Plaintiff's application would go

that the Settlement Agreements were not completely outside the Bylaws is the simple lack of any concrete evidence to the contrary.

The modified procedures for consideration of Plaintiff's application picked up at the point following the MSEC's negative recommendation and provided for another consideration at the JRC level, before proceeding to the Board for a final decision exactly paralleling the course that an application would take under the standard Bylaws procedures. The differences between the normal procedures and the modified procedures were that there would be two TRC Panels instead of one; Plaintiff had a say in the composition of those panels; and there was provided a contingent plan for determining which Panel's decision was transmitted to the Board for final decision and what deference that decision would receive.[20] Thus it can be seen that the modified procedures were actually operating substantially within the Bylaws.

Further evidence that the Settlement Agreements were not "completely outside" the Bylaws is found in paragraph 2(e) of the Settlement Agreements. This provision specifically incorporated certain Bylaws procedures, providing that if the recommendation of the Bylaws JRC was favorable to Plaintiff, it was to be presented to the Board for decision "pursuant to Article VIII, Section 4 of the By-Laws." As to the various evidence, including certain witness testimony, cited by Plaintiff in support of his position, the Court concludes that this evidence is, at best, ambiguous on this specific sub-issue. Certainly this evidence clearly supports the conclusion that the procedures were a

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to JRC level of consideration—again, before two panels instead of one—before going to the Board for a final decision.

[20] On this latter point, the Court would note that under the normal Bylaws procedures, the decision of a JRC, if there was one, always proceeded to the Board for final decision in the same manner and was received and accorded the same deference.

deviation from the normal Bylaws procedure; however, it does not come close to establishing that the procedures were completely outside the Bylaws.

There is another somewhat related issue as regards the construction of the Settlement Agreements and their status within or without the Bylaws. Plaintiff would characterize the procedures for consideration of his application as just a few simple terms pursuant to which the JRC Panels were to consider but one discrete issue and render decisions that would be forwarded to the Board, presumed to be correct, to be rubber-stamped. However, having heard all of the evidence in this case and reviewed the documents thoroughly, the Court is convinced that the agreement of the parties contained much more than that. To be sure, the portion of the Settlement Agreements setting forth the reconsideration procedures does contain a small number of provisions. However, those few provisions, the gaps in those provisions, and the parties' conduct make clear that the agreement was made against the backdrop of the Bylaws and the Florida law pertaining to consideration of privileges applications.[21] Thus, in short, where there is a need for interpretative guidance regarding the Settlement Agreements, the Court concludes that the Bylaws and the above-mentioned body of law, including that of Florida, supply the terms or at least a framework for resolution of the disagreement.

b. Discussion

Returning to the main issue, Plaintiff primarily seeks to characterize the procedures for consideration of his application as being outside the Bylaws because he maintains

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[21] The Court has already concluded such regarding the applicability of State and Federal laws providing for immunity from certain types of legal actions or relief in suits arising from peer review.

that, under such an understanding of the agreement, the Board could not properly have allowed Dr. Fogleman to appear and present the memo of the MEC at the October 25th meeting, nor could it have properly considered Plaintiff's behavior at that same meeting in making a decision on his application. However, Plaintiff can point to no provision of the Settlement Agreements that would prohibit either of these actions. His argument, at best, is as follows the procedures for consideration of his application deviated from the normal Bylaws procedures, therefore any action in conformity with the procedures provided for in the Bylaws was impermissible. But the former does not automatically follow from the latter. That is, even assuming that the parties did agree to a procedure which deviated from the scheme of the Bylaws does not mean that procedure must be wholly unlike the normal procedure under the Bylaws. Nor does the fact that the parties agreed to a procedure that deviated from the Bylaws in certain respects meant that it deviated from the Bylaws entirely. And more importantly, as noted above, the settlement agreement clearly does not prohibit either of the actions, of which Plaintiff complains.

Further, as to the statements of Dr. Fogleman and the memo he presented to the Board on behalf of the MEC, neither of these were any different from—and both were, in fact, merely a reiteration of—the arguments previously presented by the MEC to the JRC Panels, arguments that were already contained in the record before the Board in this sense, Dr. Fogleman's statements and the memo were not "new" evidence, but merely the restatement of the MEC's opposition to Plaintiffs application. Furthermore, Plaintiff, through his attorney, was permitted more than adequate opportunity to respond. Plaintiff was also permitted to file a written submission

with the Board, and his attorney was given an opportunity to speak on his behalf.[22]

And as to the issue of consideration of Plaintiff's conduct at the October 25th meeting, citing to the case of *Abramson v. The Florida Psychological Association*, 634 So.2d 610 (Fla. 1994), Plaintiff argues that the Board validly waived its normal review of the decisions of the JRC Panels and agreed to review those decisions deferentially. Plaintiff argues that, by doing so, the Board specifically waived its ability to consider matters outside of the evidence presented to the JRC Panels, including Plaintiff's conduct at the October 25, 1994, meeting. A review of *Abramson* is necessary before discussing this issue further.

In *Abramson* the Florida Supreme Court reviewed the ability of two state agencies to waive the statutorily mandated educational requirements of Ch. 490, Fla. Stat., as to two individuals seeking to become licensed psychologists, in order to settle a suit brought by those individuals challenging that Chapter, *Id.* at 610-611. The applicants brought suit because, although both held doctoral degrees in psychology from a licensed but unaccredited institution, they were still not eligible under Ch. 490 to take the licensure examination due to the fact that said chapter required all those seeking to become a licensed psychologist by examination to hold a doctoral degree from an institution with a particular accreditation. *Id.* at 611. The lawsuit brought by the applicants was ultimately settled by their agreement that, in exchange for their withdrawal from the suit, they could be licensed either (1) without examination if they proved they had certain qualifications or

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[22] Interestingly, review of the transcript of the October 25th meeting (Plaintiff's Exhibit 110b) shows that, while Dr. Fogleman's presentation constitutes less than five full pages of the transcript, the presentation of Plaintiff's attorney, Walter Campbell, with a few interruptions, constitutes well over twenty pages.

(2) if they passed the standard examination in no more than two sittings. *Id.* The validity of this settlement was then challenged in another suit by an association of licensed psychologists, who sought to enjoin licensure of the plaintiffs on the basis that the state agencies did not have the power to ignore the legislatively mandated requirement that all licensed psychologists be graduates of an accredited institution. *Id.* at 611-12.

The trial court granted the injunction sought by the association, and the District Court of Appeal affirmed; however, the Supreme Court reversed. *Id.* at 612. Noting that public bodies possess an inherent power to settle litigation, the Supreme Court held that public policy and fairness favored the validity and enforcement of this particular settlement agreement. *Id.* Additionally, the Court noted that the agencies involved had, at most, only deviated minimally from the legislative intent of Ch. 490 in allowing the alternative licensure thereunder. *See id.*

However, it is important to note several things about the *Abramson* decision. First, the Supreme Court flatly refused to formulate a general rule about the ability of public bodies to deviate from their legislative mandates, instead expressly limiting its holding to the facts of that case. *Id.* Second, the Court expressly held that, while agencies charged with enforcement of a matter have the authority to interpret the laws they administer (including, in that case, the power to deviate "slightly" from the legislative ititent), those agencies cannot act in a manner contrary to clear legislative intent. Third, and most important when drawing on *Abramson* for analogy, the Court expressly noted that the settlement at issue in that case did not jeopardize the health or welfare of the citizens, as it still required the applicants to hold the requisite education and to pass the examination. *Id.* In other words, the Court concluded that the agency action in that case was proper because the agencies had not abdicated their basic duty to ensure a qualified applicant;

rather, they had merely approved an alternative procedure for licensure, which procedure still assured that the applicant was fully qualified and thus that the agencies duties were properly discharged. *See id.*

Returning to the specific context of physicians and privileges to practice at a hospital, it is clear that a physician's ability to work with others is a criterion legitimately examined by a hospital board when considering a privileges application. In fact, § 395.0191(4), Fla. Stat., expressly lists such ability as a basis on which an applicant's eligibility for medical staff membership or clinical privileges at a hospital is to be determined. Further, Article III, § 2(a) of the SCPH Bylaws, which sets forth the qualifications for membership on the Staff of the Hospital, reiterates this portion of § 395.0191(4).[23] Lastly, all courts which have considered the issue have concluded that the ability of a physician to work smoothly and harmoniously with others is a factor reasonably related to the objective of good patient care, such that a hospital can take adverse privileges action based on the lack of that ability. *See Mahmoodian v United Hospital Center*, 404 S.E.2d 750, 759-61 (W.Va. 1991); *see also Ladenheim v. Union County Hospital District*, 394 N.E.2d 770, 776 (Ill. 5th Dist, 1979). And while the courts of a few states have required a heightened showing of the likelihood that disruptive conduct will negatively affect patient care in order to justify an adverse privileges action, as noted in *Mahmoodian*, virtually all other courts to consider the issue have only required that the hospital board conclude that in its

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[23] In the Summary Judgment Order (Dkt. 157), the Court noted that the Defendants, at that time, had not pointed out to the Court any provision of the Bylaws which permitted consideration of disruptive conduct in privileges decisons. At trial, Defendants entered into evidence a complete copy of the Hospital Bylaws (Def. SCPHB Ex. 1), including Article III thereof.

opinion the disruptive conduct or behavior "may" or "could" adversely affect patient care. 404 S.E.2d at 761.

Plaintiff also relies upon the *Mahmoodian* decision, but emphasizes two other portions thereof: The first is the *Mahmoodian* Court's acceptance of the above-stated general standard for a showing of likelihood of disruption of patient care with the caveat that "potential effect on patient care may not be presumed but must be shown by the evidence." *Id.* The second is the *Mahmoodian* Court's observation that the right of a hospital to take an adverse privileges action based on disruptive conduct or behavior does not include the right to take action against a physician merely because he is "irascible" or because he "generally annoys other physicians, nurses, or administrators." *Id.*

Against this backdrop, Plaintiff argues that the Board's consideration of his behavior, and especially that exhibited at the October 25, 1994, meeting, was inappropriate. First and foremost, as noted above, Plaintiff can point to no provision of the Settlement Agreements that precludes consideration of his behavior. There is clearly no express provision of the agreement on this point. Nor can such a restriction be reasonably inferred from any part of the agreement. And, in the absence of some provision of the modified procedures precluding consideration of Plaintiff's behavior, Florida law, the Hospital Bylaws, and the bulk of case law on the subject support consideration of that factor and support negative privileges action based on the consideration of behavior or conduct when, in a hospital board's judgment, such inability may or could adversely affect patient care at the hospital.

If the Settlement Agreements could be construed to preclude the Board's consideration of Plaintiff's behavior, the Court would find such provision unenforceable in spite of *Abramson*, as such an agreement would go beyond a public body's merely acting in an alternative manner that still

achieved the goal of its charged duty. Any agreement to ignore relevant conduct of a physician in consideration of a privileges application would be more than a mere deviation from § 395.0191(4). And, in light of that statute and the other authority cited above, any such agreement would clearly be an abdication of the Hospital Board's basic function to ensure that physicians who practice at this *public* hospital render, and contribute to, quality patient care. Such would clearly be inappropriate under *Abramson*.

3. Sufficiency of the Evidence to Overcome the Presumption(s) of Correctness

As noted above, the Court is assuming, as contended by Plaintiff, that the Board was obligated to review the decisions of both JRC Panels as if a presumption of correctness attached to both. Plaintiff argues that the application of such a presumption would require the Board to find "clear and compelling evidence"[24] in order to overcome the presumption. Defendant contends that the Board could have overcome such a presumption if, on review, it found the findings of the JRC Panels to be clearly erroneous. Although the parties have characterized the standard necessary to overcome the presumption of correctness in somewhat different terms, and although the Plaintiff's standard is one more akin to one applied by a trier of fact while Defendant's characterization is one more akin to one applied by a superior body reviewing the findings of a trier of fact, the Court nonetheless concludes that the standards do not differ meaningfully.[25] This is so because clear and

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[24] Plaintiff interchangeably uses the terms and "clear and compelling" and "clear and convincing." For consistency and to minimize confusion, the Court will use the term "clear and convincing."

[25] The Court is, of course, wary about too rigidly applying judicial procedures and standards to this decidedly non-judicial context. Nonetheless, to the extent that the Board inherently was performing some judicial-like function, and to the extent that the settlement

convincing evidence is that which makes the truth of the facts asserted highly probable, producing in the mind of the fact finder a firm belief or conviction as to the truth of the facts sought to be established. *See, e.g., Slomowitz v. Walker*, 429 So.2d 797, 799-800 (Fla. 4th DCA 1983). However, evidence in opposition to a fact or finding does not preclude the establishment of that fact or finding by clear and convincing evidence. *See, e.g.*, In re *Bryan*, 531 So.2d 1062, 1063 n.1 (Fla. 4th DCA 1988), *quashed on other grounds* 550 So.2d 447 (1989). Likewise, under a clearly erroneous standard, a finding is said to be clearly erroneous if, upon reviewing the entire evidence, despite the existence of evidence to the contrary, the decision-maker is left with the definite and firm conviction that the fact or finding being reviewed is erroneous or mistaken. *See, e.g., United States v. United States Gypsum Co.*, 333 U.S., 364, 395 (1948) (cited. at p.4 of Defendant SCPHB's Post-Trial Brief (Dkt. 258)).

The record before the Board contained significant evidence to support the conclusion that Plaintiff was abrasive and disruptive in a manner which both had affected and could in the future affect the rendering of patient care at the Hospital. Such evidence includes, but is not limited to, Plaintiff's behavior before the Credential Committee at the earliest stages of his application process, the bulk of the witnesses and other evidence presented at the hearing before the JRC Panels, and Plaintiff's behavior at the October 25, 1994, meeting. And on this latter point, Plaintiff's behavior at that meeting clearly shows that Plaintiff was unable to comport himself well in situations involving interaction with his medical colleagues and the Hospital administration,

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agreement, as well as the original Bylaws, were obviously drafted by attorneys who were of course most familiar with legal standards, such standards are the Court's best guide in elucidating the Settlement Agreements.

As specifically regards Plaintiff's behavior at the October 25, 1994, there is more than sufficient evidence to reasonably support the conclusion of the majority of the Board members that Plaintiff was disruptive at that meeting. At trial, six of the Board members testified that Plaintiff was disruptive, using such terms as "aggressive," "very loud," "threatening, abrasive," "upset," and "agitated" to describe him and indicating that he was pointing his finger at the Board when he spoke. The testimony offered by Plaintiff in opposition in fact confirms the more objective aspects of these six witnesses and differs only as regards the more subjective components. That is, Plaintiff's witnesses agree that he was loud, angry, very upset, and "gesturing expansively," but state that, in their opinions, he was not threatening or offensive and that he didn't show his temper. Further, a significant portion of the testimony offered by Plaintiff to show that he was not disruptive is the transcript of the hearing, which of course does not convey such important information as his tone of voice, volume of speech, facial expression, or body language and gestures. *Cf. Foster v. Wainwright*, 686 F.2d 1382, 1388 (11th Cir. 1982) (noting inability of court reporter to transcribe such things as facial expressions, gestures, and other nonverbal conduct, and thus deferentially reviewing trial judge's decision to exclude criminal defendant from courtroom based on defendant's disruptive conduct). Additionally, Plaintiff relies on the testimony of former counsel who represented him in this matter before the Board and specifically at that hearing. Although these counsel testified at trial that Plaintiff was not, in their opinion, disruptive or showing his temper, it is undisputed that these same counsel saw fit to take Plaintiff out of the hearing room to speak with him during the October 25, 1994, meeting.

Given the undisputed interrelationship between a physician's ability to interact harmoniously with all those he

encounters in a hospital setting and the overall rendering of quality patient care, there was clearly a substantial, competent basis upon which the Board could have concluded that Plaintiff's application should be denied. Based upon the evidence presented to the Board, the Court cannot conclude that, as a matter of law, the Board could not reasonably have found the evidence to be clear and convincing of the conclusion it reached. Based upon both the general principle of *Sosa v. Board of Managers*, 437 F.2d 173, 177 (5th Cir. 1971)[26] (Cautioning against substitution of judicial judgment for that of hospital board where criteria applied by hospital are reasonably related to hospital operation),[27] as well as the general standard (if review to be accorded to decisions made under a standard of clear and convincing evidence, *see, e.g., McKesson Drug Co. v. Williams*, 706 So.2d 352, 353-54 (Fla. 1st DCA 1998) (setting forth criteria by which to review cases involving burden of clear and convincing evidence), the Court will not undertake more of an invasive examination of the decision of the Board.

4. The Other Asserted Breaches

Additionally, Plaintiff asserts that the settlement agreement was breached by the alleged failure of Chair Lee to provide the Board with the findings of both JRC Panels and also by Board Member Moss' consideration of the minutes of the September 22, 1994, Medical Executive Committee meeting as part of his deliberation on Plaintiff's privileges application. Although neither of these asserted breaches

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[26] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11 Cir. 1981) (adopting as binding precedent all decisions rendered by the former Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981).

[27] *See Shahawy v. Harrison*, 875 F.2d 1529, 1513 (11th Cir. 1989) (citing above-referenced position of *Sosa* with approval.

were plead in the Amended Complaint, as the Defendant Hospital had only noted this fact but not expressly objected to consideration of these issues, and in the interest of completeness, the Court will more briefly address each of these issues in turn.

a. Alleged Failure to Provide the Board with Both JRC Panel's Findings

Plaintiff asserts that the Board was not provided with the findings of both JRC Panels and thus that it could not properly have concluded that there was sufficient evidence to overcome both of those decisions. However, at best the evidence—both in general and specifically that cited by Plaintiff—establishes that the Board did not have actual physical copies of the verdicts of the JRC Panels prior to the beginning of their deliberations, which followed the October 25, 1994, meeting. But there is absolutely no evidence that the Board Members did not have copies of these verdicts during their deliberations. Further, the evidence is unequivocally clear that either prior to or during the October 25, 1994, meeting, the Board Members had been informed regarding (1) the issue presented to the JRC Panels, (2) a rough synopsis of the proceedings before those panels (including the evidence presented), and (3) the verdicts reached by each Panel. And during their deliberations, the Board had full access to the transcripts and exhibits presented to the Panels. Lastly, the Final Decision[28] rendered by the Board clearly states that, in rendering its decision to deny Plaintiff's application, the Board considered, inter alia, "the recommendations of the Judicial Review Committees," clearly indicating that the Board knew of and overturned the decisions of both JRC Panels. The Court thus concludes that there was no breach

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[28] Def. SCPHB Ex. 162.

of contract as regards a failure to provide the Board with the decisions of the JRC Panels,

b. Moss' Alleged Consideration of the September 22d MEC Meeting Minutes

The evidence cited by Plaintiff to support this assertion is equivocal and thus, in the Court's opinion, insufficient to establish that Moss did in fact consider these minutes during his deliberations. While at one point in his testimony at trial Moss responded affirmatively when asked if he had reviewed the minutes of the most recent Medical Executive Committee meeting (i.e., the September 22, 1994, MEC meeting) while deliberating over Plaintiff's application, later in his testimony Moss clarified that he had only reviewed Dr. Fogleman's letter memorandum[29] during his deliberations, as only that letter, and not the minutes of the MEC September 22d MEC meeting, was ever presented to the Board.

But even assuming that Plaintiff sufficiently proved that Moss had in fact reviewed these minutes, such is irrelevant for several reasons. First of all, Plaintiff can point to no provision of the Settlement Agreement, or any alleged modification thereto, which would have precluded consideration of these minutes. Rather, Plaintiff relies on his general argument that the Board had agreed to receive and rubber-stamp the JRC Panels' findings. The Court has expressly rejected this argument. Further, the substantive contents of these minutes is entirely duplicative of the position held all along by the MEC, which position was made known to the Board in Fogleman's letter and through his oral presentation to the Board. The only opinions expressed in those minutes adopt the recommendation to deny Plaintiff's application previously made to the Board

[29] This was the letter which was the basis of Fogleman's oral presentation to the Board at the October 25th meeting.

by the MEC—a recommendation that was part of the whole record before the Board. This latter point disposes of Plaintiff's third argument that the contract was somehow breached or, at least, that he was denied the fair hearing that he bargained for because he was denied the opportunity to adequately cross-examine these minutes. As the content of the minutes duplicated the Medical Staff's prior recommendation to the Board, its arguments to the JRC Panels, and Fogleman's oral presentation to the Board—positions and arguments which Plaintiff had been provided more than adequate opportunity to respond to—it is clear that Plaintiff was not denied anything. At most, Plaintiff can argue that, without being able to examine these minutes to determine exactly which members of the Medical Staff participated in that meeting, he was unable to specifically point out to the Board exactly which members of the Committee might have been biased against him because he had previously sued or otherwise challenged them. However, at the October 25, 1994, meeting, Plaintiff did have the opportunity at least to raise generally to the Board the issue of the possible existence of such biases, and the record discloses that the Board was otherwise aware of, or had been provided information about, the membership of the MEC and the identity of those whom Plaintiff had previously sued or otherwise challenged. The Court thus concludes that there was no breach of contract as regards Board Member Moss and any consideration of the minutes of the September 22d MEC meeting.

III. Conclusion

As the Court has concluded that there was no breach of contract, the issue of the proper remedy need not be reached. Based upon the Court's rulings during trial, granting the Defendants' various Rule 50 motions, and the instant ruling, the Court will direct the Clerk to enter judg-

ment in favor of Defendants on all counts of the Amended Complaint.

Upon consideration thereof, it is hereby ORDERED that the Clerk is DIRECTED to enter judgment in favor of Defendants on all counts of the Amended Complaint (Dkt. 40).

DONE AND ORDERED, at Jacksonville, Florida, this 16th day of July, 1998.

RALPH W. NIMMONS, JR.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

(2)

No. 99-2045

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The District Court's Orders granting immunity from damages under the Health Care Quality Improvement Act ("HCQIA" or the "Act") are unreported. Although the Petition indicates that these Opinions are included in the Petitioner's Appendix, they were not included.

STATEMENT OF THE CASE

This case involves the denial of medical staff and clinical privileges to a physician, Mahfouz El Shahawy, M.D. ("Shahawy"), by a local governmental body, the Sarasota County Public Hospital Board (the "Board"). The Board operates a local public hospital, Sarasota Memorial Hospital (the "Hospital"). The litigation arises out of peer review within the Hospital. After formal hearings, the Hospital Board concluded that Shahawy's disruptive behavior presented too great of a risk of hindering the delivery of quality patient care at the Hospital. The Board denied Shahawy's application for restoration to the medical staff at the Hospital.

Although this case relates to Shahawy's 1991 application for privileges at the Hospital, disputes between Shahawy and the Hospital date back to the early 1980s. On October 31, 1983, the Board terminated Shahawy's membership on the medical staff at the Hospital. A major ground for the 1983 termination was Shahawy's disruptive behavior, specifically found to adversely affect the quality of patient care and orderly operation of the Hospital.

The Board's 1983 Order was challenged by Shahawy in a prior suit in the District Court, naming as Defendants the

Board, five Board members individually, twelve physicians, and two attorneys. After extensive litigation, that case ended in judgment for all Defendants. The Eleventh Circuit Court of Appeals held that termination of staff membership was supported by substantial competent evidence, *Shahawy v. Harrison*, 875 F.2d 1529, 1533-34 (11th Cir. 1989), although the antitrust claim was not disposed of until *Shahawy v. Harrison*, 51 F.3d 1049 (11th Cir.), *cert. denied*, 516 U.S. 821 (1995).

In January, 1991, while the case relating to his 1983 termination was still being litigated, Shahawy filed a new application for medical staff membership. After going through the peer review procedures prescribed by the medical staff by-laws, that application was denied by the Board in January, 1994. Again, Shahawy's disruptive behavior was a ground.

Shahawy filed two suits in state court, one against various then-current Board members, and the other a Petition for Certiorari to review the Board's denial. Those two state court cases went to mediation jointly, resulting in two settlement agreements and dismissal of both cases. Pursuant to the settlements, the peer review of Shahawy's 1991 application was reconvened with a hearing by two judicial review panels (instead of one) and was thus a partial deviation from the by-laws. The process was not, as the Petition states, "wholly" outside the by-laws. Pet. 7. Shahawy also received money as part of the settlements. The Petition erroneously describes this payment as "damages." Pet. 7.

Shahawy contended he was no longer disruptive, that he was a changed man. Both hearing panels agreed and recommended that Shahawy be reinstated.

On October 25, 1994, the Board held a formal hearing. Presentations were made by counsel. Dr. Fogelman, Chief of the Medical Staff, spoke on behalf of the Medical Executive Committee in opposition to granting Shahawy's application. At the conclusion of the hearing, Shahawy began addressing the Board and the Board Chairwoman directly. Shahawy persisted in demanding the names of the physicians on the Medical Executive Committee who had voted to oppose his application. He was told that his demand was prohibited by Florida Statutes section 395.0191, which statute affords confidentiality to the proceedings of peer review committees. When Shahawy's demand was properly denied by the Board Chairwoman, Shahawy exploded into a tirade (referred to herein as the "outburst"). At one point during this episode, Shahawy's attorneys asked for a brief recess to take Shahawy outside of the hearing room to speak with him. His counsel was unable to calm him. The outburst continued upon his return. Finally, the Chairwoman was able to adjourn the meeting.

On October 31, 1994, the Board met, reviewed the evidence, and voted six to two to deny Shahawy's application. The Board's final decision was issued on November 8, 1994.

The outburst was the primary reason for the Board's decision. In this regard, the history of Shahawy's relationship with the Hospital was significant. As pointed out above, the termination of his staff membership in 1983 was based on disruptive conduct. A finding of disruption also caused the January, 1994 denial of his application for reinstatement. So, on October 31, 1994, the question uppermost in the minds of the Board members was whether Shahawy's temperament had changed. Had Shahawy acquired the self-control that he had previously been lacking? Six Board members believed

that because Shahawy flew off the handle on October 25, 1994, there was too much probability that he would do so again and again. They decided they would be shirking their responsibility to future Hospital patients if they readmitted Shahawy to the medical staff.

This litigation followed. The case against the Board went to trial on three counts: a claim that the denial of Shahawy's application was in retaliation for his exercise of his First Amendment right of free speech, a claim that the denial of the application was on account of his Egyptian national origin, and a breach of contract claim relating to the settlement agreements. In addition, there were civil rights claims by Shahawy against five individual Defendants (past and present Board members who voted to deny Shahawy privileges) alleging discrimination based upon his national origin.

In its Order dated December 31, 1996, the District Court granted the Board's motion to establish HCQIA immunity from damages with respect to the breach of contract count, walking step-by-step through the immunity analysis under 42 U.S.C. § 11112. The District Court found that because the Plaintiff failed to rebut the presumptions of 42 U.S.C. § 11112(a), the Board was entitled to the immunity provided by the HCQIA. On motion for reconsideration, the District Court, by Order dated January 15, 1997, reaffirmed that the Board was entitled to immunity.

Trial before a jury commenced on January 6, 1997. At the conclusion of Shahawy's case in chief, the District Court granted the individual Defendants' and the Board's motions for judgment as a matter of law as to all of Shahawy's civil rights claims, including the claims alleging national origin

animus and discrimination. The court discharged the jury and proceeded with a bench trial on Shahawy's claim for equitable relief in the contract count. The District Court then held there was no breach of contract.

Judgment was in favor of all Defendants on all counts.

Shahawy did not appeal either his First Amendment claim against the Board or his national origin discrimination claims against either the Board or the individual Defendants to the Eleventh Circuit. His appeal related only to the Health Care Quality Improvement Act immunity and the breach of contract claim.

Once the judgment with regard to the unappealed claims became final, and despite the heightened standard that must be met by Defendants seeking attorneys' fees in connection with civil rights claims, the District Court awarded fees and costs in excess of $450,000.00 in favor of the Board and the individual Defendants against Shahawy, finding that Shahawy had "conjured up" his civil rights claims. With regard to the ethnic and national origin slurs allegedly used against Shahawy, the District Court noted that, at trial, "the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member . . ." Shahawy has appealed the attorneys' fees award to the Eleventh Circuit.

SUMMARY OF ARGUMENT

Shahawy's Petition for Certiorari should be denied.

No important question of federal law that should be decided by this Court is presented by the Petition. The

District Court completely, thoroughly, and properly analyzed the issues under the HCQIA. The HCQIA is applicable because Shahawy's peer review process was a professional review action under the Act. The settlement agreements did not waive the applicability of the HCQIA, and the HCQIA is regularly applied to circumstances involving contracts. The HCQIA immunity did not operate to prevent Shahawy from attempting to prove his separate civil rights claims.

The Petition creates a misleading picture of the case below by mischaracterizing or omitting facts critical for meaningful review. Shahawy improperly and inaccurately suggests that he was denied the opportunity to present his evidence of racial or national origin bias to a jury. Shahawy presented his discrimination evidence to a jury, he simply failed to prove his civil rights claims. Shahawy also omitted crucial facts with regard to his history of disruptive behavior and his conduct at the Board's formal hearing on October 25, 1994, from his Petition. This mischaracterization and omission of facts is sufficient grounds to deny the Petition.

With Supreme Court Rule 10 as a guide, the Petition presents no reason why this Court should accept review.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

This case presents no important question of federal law that should be settled by this Court. The issues presented are significant only to the parties to the proceeding. There is no national interest to be served, and no policy determination to be made here.

Shahawy attempts to create the illusion of an important question of federal law by asserting that the Health Care Quality Improvement Act was improperly used to shield all manner of egregious conduct. In fact, the Health Care Quality Improvement Act was carefully, methodically, and properly applied to the facts of this case by the District Court judge. Shahawy's real issue here is not with the law or with the legal analysis, but instead with the factual determinations that have been made. As Supreme Court Rule 10 provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Shahawy suggests that the HCQIA immunity should not have been granted in this instance because a "voluntary settlement agreement" is involved. Pet. 2. Although Shahawy states that "simple logic" compels a determination that the Hospital Board must have waived HCQIA immunity as part of the settlement, he cites no authority for this proposition

and fails to explain this "logic." Pet. 2. There is nothing in the HCQIA that would bar its application to a situation involving a settlement agreement. The Health Care Quality Improvement Act was applicable here because a professional review action, as defined by the Act, was involved. The District Court made the determination that Shahawy's peer review was a professional review action. Shahawy did not take issue with that particular determination in the Eleventh Circuit. Further, the Eleventh Circuit held, "As the district court observed, [Shahawy] has not pointed to anything in the settlement expressly or by necessary implication waiving HCQIA immunity." Pet. App. 2a. This Court should have no interest in re-examining whether the particular contracts between these two parties waive immunity.

Shahawy also asserts that because contracts (the settlement agreements) are involved, Health Care Quality Improvement Act immunity should not have been afforded because immunity may undermine the implied obligation of good faith and fair dealing in contracts. Pet. 5-6. Shahawy's apparent suggestion is that this is a unique circumstance which merits this Court's attention. There is nothing unusual in the application of the HCQIA to a circumstance involving a contract. In fact, there is frequently a contract involved where the Health Care Quality Improvement Act is applied. For example, in *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995), the Eleventh Circuit reversed a jury verdict against a Florida hospital on a breach of contract claim because the hospital was entitled to HCQIA immunity. The contract in *Bryan* was the medical staff by-laws. Medical staff by-laws have been found to be contracts between the physician and the hospital in most states, including Florida.

See Lawler v. Eugene Wuesthoff Memorial Hosp., 497 So. 2d 1261 (Fla. 5th DCA 1986). The contractual setting is not unique and does not present an important question of federal law that should be considered by this Court.

Shahawy makes passing reference to his civil rights claims in the Petition. Pet. 3. However, the Petition, including the Question Presented, is otherwise written so as to create the inaccurate impression that, because of Health Care Quality Improvement Act immunity, Shahawy never received his "day in court" with respect to his allegations of racial and ethnic animus on the part of the Board and Board members. Nothing could be further from the truth. In fact, Shahawy's national origin discrimination claims against the Board and Board members were fully litigated before a jury. Shahawy lost those claims on the Rule 50 motions by the Board and individual Defendants, and Shahawy chose not to appeal as to those counts. Further, Shahawy has been ordered to pay costs and attorneys' fees to the Board and the individual Defendants with regard to the civil rights claims. Undaunted, Shahawy, in his Petition, treats the allegations of racial and ethnic animus as established fact. He attempts to bootstrap his Health Care Quality Improvement Act argument before this Court to the failed civil rights claims.

The Petition, moreover, suggests that the discrimination allegations were central to Shahawy's contract claim and to the dispute regarding Health Care Quality Improvement Act immunity. A review of the District Court Order disposing of the contract claim and the Orders granting immunity display otherwise, and the discrimination allegations received only scant mention in Shahawy's briefs to the Eleventh Circuit.

The Health Care Quality Improvement Act immunity, of course, related only to the breach of contract claim and did not extend to the civil rights counts. Thus, contrary to Shahawy's assertions, the Health Care Quality Improvement Act immunity did not "disguise transparent racial and ethnic bigotry." Pet. i. Shahawy had every opportunity to present his civil rights case, and he did so. The facts simply did not support Shahawy's allegations of national origin bias. Shahawy's reckless and unproven allegations of discrimination do not transform the District Court's Health Care Quality Improvement Act determination into an important question of federal law that should be considered by this Court.

Supreme Court Rule 10 provides the necessary framework for the analysis of Shahawy's Petition. He has not alleged conflict between the Eleventh Circuit's decision and that of another United States Court of Appeals or a state court of last resort. As the above discussion demonstrates, no important question of federal law is presented. When one carefully analyzes Shahawy's Petition, his asserted error relates to "factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

II.

THE PETITION SERIOUSLY MISSTATES AND OMITS FACTS CRITICAL FOR MEANINGFUL REVIEW.

This Court is not in the business of canvassing the record in each case to discern the central facts or to correct the mischaracterization thereof. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925), yet, Petitioner herein

asks the Court to do exactly that by misstating, mischaracterizing, and omitting facts critical for review. Such misconduct is a sufficient reason for denying certiorari. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).

As referenced above, the Petition is written, and the Question Presented is framed, so as to suggest that the granting of Health Care Quality Improvement Act immunity shielded the Board from Shahawy's allegations of discrimination and prevented Shahawy from presenting that case to a jury. The Petition is extremely misleading as to this subject.

Shahawy also glosses over and mischaracterizes his outburst at the October 25, 1994 meeting, and fails to give the necessary historical context of the prior findings with regard to his disruptive conduct. The District Court's analysis emphasizes the "outburst," linking it to other relevant evidence of disruption. The District Court found that

> the record before the Board contained significant evidence to support the conclusion that Plaintiff was abrasive and disruptive in a manner which both had affected and could in the future affect the rendering of patient care at the Hospital . . . Plaintiff's behavior at that meeting clearly shows that Plaintiff was unable to comport himself well in situations involving interaction with his medical colleagues and the Hospital administration.

Pet. App. 27a. The issue of Shahawy's disruptive behavior was a central one below. Shahawy's dismissive treatment of that subject in his Petition is misleading.

There was a dispute below as to whether the Board was obligated under the settlement agreements to apply a "presumption of correctness" to the two decisions of the panels. The District Court did not decide that dispute but instead assumed that the Board was obligated to apply a presumption of correctness, inasmuch as there was clear and convincing evidence overcoming the presumption. Pet. App. 17a. Shahawy neglects to mention the District Court's treatment of this subject in his Petition.

Further, throughout the Petition Shahawy asserts that his peer review process was "materially" or "wholly" outside the Board's by-laws. Pet. 2, 7. Although Shahawy's peer review pursuant to the settlement agreements did deviate to some degree from the by-laws (for example, Shahawy was afforded two judicial review panels instead of one), Shahawy overstates the point in an apparent effort to suggest that HCQIA immunity was not appropriate. The by-laws were applied where there was not an express deviation called for in the settlement agreements. The District Court describes the process as "modified" but "substantially within" the by-laws. Pet. App. 18a-20a.

Although the Petition makes other misrepresentations and omissions, the foregoing suffice to illustrate the nature of Petitioner's allegations. These allegations will make difficult a decision by this Court on the basis of the *actual* facts below. Such is a significant reason for denying certiorari. "Were we to pass upon purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion, but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway*, 396 U.S. at 110.

CONCLUSION

For the foregoing reasons, Respondent respectively requests that this Honorable Court deny the Petition.

Respectively submitted,

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